

**Before the Hearing Panel  
At Wellington**

**Under** the Resource Management Act 1991 (**RMA**)

**In the matter of** Proposed Natural Resources Plan for the Wellington Region  
(Hearing Stream 2)

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**Wellington Regional Council Legal Submissions for Hearing Stream 2: Air  
quality management, land use in riparian margins and stock access to water  
bodies and soil conservation**

**Date:** 9 June 2017

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**MAY IT PLEASE THE PANEL:**

- 1            These submissions address two legal issues relevant to the subject matter of Hearing Stream 2. Those matters are:
  - 1.1            The draft National Environmental Standard for Plantation Forestry (**Plantation Forestry NES**), and
  - 1.2            Regulations relating to the exclusion of stock from waterways proposed through the Clean Water package 2017.<sup>1</sup>
  
- 2            The need for legal submissions arises because both of these Regulations are still in draft, or at the proposed stage. However, based on current indications from the relevant Ministries responsible for these Regulations, it is understood they are likely to be in place before the Panel makes its decisions on the proposed Plan.
  
- 3            The subject matter of the two proposed sets of Regulations is relevant to this Hearing Stream due to the provisions of the proposed Plan that relate to the regulation of forestry activities and stock access to, and discharges in, waterways. The substantive relevance of the Regulations is addressed by Paul Denton and Barry Loe in the section 42A reports for this Hearing Stream.
  
- 4            As each of the Regulations are different and made through different regulatory methods - one being a NES made under section 43 of the RMA, the other being a general Regulation made under section 360 of the RMA, the approach to be taken to each of the Regulations by the Panel differs. We address each issue in turn.

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<sup>1</sup> Published in February 2017 by the Ministry for the Environment, with submissions closing on 28 April 2017.

## Plantation Forestry NES

5 At the time of writing, the Ministry for Primary Industries (**MPI**) is in the process of working on a final version of the Plantation Forestry NES.

6 A draft Plantation Forestry NES was released for submission, with submissions closing in August 2015. Since that time, MPI has been working with key stakeholders to develop the provisions of the Plantation Forestry NES. The Council has been one of those stakeholders.

7 The current expectation is that the Plantation Forestry NES will be formally made on 1 July 2017, but it will not have effect until 1 July 2018. This is, however, to be confirmed when the Plantation Forestry NES is made.

8 In terms of the Panel's treatment of the Plantation Forestry NES, it is up to the Panel to determine the relevant weight to be given to the NES at this stage. There is no legal requirement to consider a draft NES<sup>2</sup> and a draft has no status (unlike a proposed Plan, for example). However, the Panel may consider it a relevant matter for consideration, and it will depend on where it is at in the process at the time the Panel makes its decision as to how much weight the Panel can place on it.

9 In terms of the legal process, the RMA provides clear direction to Councils and decision makers on how a NES (once made under section 43 of the RMA) interacts with planning documents:<sup>3</sup>

9.1 Section 43B of the RMA sets out the relationship between a NES and a rule. Generally speaking, the provisions of the NES prevail unless otherwise stated.<sup>4</sup>

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<sup>2</sup> NES is defined in section 2 of the RMA as a regulation made under section 43. It does not include a proposed regulation.

<sup>3</sup> The full text of the relevant provisions is included as Appendix 1.

- 9.2 Section 44A of the RMA sets out how the Council must recognise a NES within its plan or proposed Plan. Generally speaking, unless otherwise stated, if there is duplication or conflict, the Council must amend its proposed Plan to remove that duplication or conflict without using the Schedule 1 process.
- 9.3 Section 66(1)(f) of the RMA requires the Council to prepare and change any regional plan in accordance with any Regulations. An NES is a regulation made under the RMA.<sup>5</sup>
- 9.4 Section 68(2) of the RMA states that every rule in a regional plan has the force and effect of a Regulation made under the RMA, but if it is inconsistent with a Regulation made under the RMA the Regulation prevails over the rule. An NES is a Regulation made under the RMA.
- 10 Accordingly, the RMA determines the impact of the NES and if changes are required to the proposed Plan when the Plantation Forestry NES comes into force, then either the Panel or the Council (depending on timing) can amend the proposed Plan as required by the Plantation Forestry NES in accordance with section 44A of the RMA (without needing to consider the scope from submissions to do so).

### **Stock exclusion regulations**

- 11 In summary, the proposal regarding stock exclusion is to introduce requirements regarding stock exclusion from rivers, lakes and wetlands over time from 1 July 2017 to 2030, with deadlines depending on stock type, river width and land gradient. This is to be supported by a new infringement offence. At this stage, the proposal regarding both the stock exclusion requirements and related infringement have been put

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<sup>4</sup> It also addresses the relationship between NESs and resource consents but we do not address that in these submissions.

<sup>5</sup> Section 43, RMA.

forward as part of the Clean Water package 2017 for consultation but have no formal legal standing.

- 12 Unlike a NES, there are no specific provisions within the RMA that address the relationship between Regulations and a proposed Plan, or the process to be followed to amend a proposed Plan, when Regulations are made under section 360 of the RMA, following notification of a proposed Plan.
- 13 Ideally, the transitional provisions of the Regulations will address how the Regulations are to be treated by the Council.<sup>6</sup> However, in the absence of any express transitional provisions sections 66(1)(f) and section 68(2) of the RMA are relevant (as set out above in paragraphs 9.3 and 9.4 above).
- 14 In that sense, any rule in the proposed Plan (or operative Plan) that is inconsistent with any Regulations will effectively be overridden by the Regulations, when they come into force.
- 15 As to how the proposed Plan can be amended if that were to be the case and the Panel was yet to make a decision, then where there is scope in submissions to make required amendments, the Panel can make those amendments. Where there is no scope in submissions, there are no options available to the Panel, but the Council could:
  - 15.1 Rely on clause 16 and make a minor amendment (depending on whether the tests in clause 16 are met).
  - 15.2 Pursue a variation to the proposed Plan under clause 16A.
  - 15.3 Withdraw the relevant part of the proposed Plan under clause 8D.
  - 15.4 Remove the relevant inconsistencies/otherwise amend the provisions through a later in time plan change.

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<sup>6</sup> Section 360(2F) of the RMA specifically allows this.

16 Which option the Council proceeds with will likely be influenced by the extent of any change to the provisions it considers is required and the timing of the Regulations.

17 The approach to be taken to the stock exclusion Regulations can be considered further when (and if) Regulations are made during this proposed Plan process.

**Date:** 9 June 2017



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Council

## **APPENDIX 1 - RMA PROVISIONS RELEVANT TO NATIONAL ENVIRONMENTAL STANDARDS AND REGULATIONS**

### **43B Relationship between national environmental standards and rules or consents**

- (1) A rule or resource consent that is more stringent than a national environmental standard prevails over the standard, if the standard expressly says that a rule or consent may be more stringent than it.
- (2) For the purposes of subsection (1),—
  - (a) a rule is more stringent than a standard if it prohibits or restricts an activity that the standard permits or authorises:
  - (b) a resource consent is more stringent than a standard if it imposes conditions on an activity that the standard does not impose or authorise.
- (3) A rule or resource consent that is more lenient than a national environmental standard prevails over the standard if the standard expressly says that a rule or consent may be more lenient than it.
- (4) For the purposes of subsection (3), a rule or resource consent is more lenient than a standard if it permits or authorises an activity that the standard prohibits or restricts.

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### **44A Local authority recognition of national environmental standards**

- (1) Subsections (3) to (5) apply if a local authority's plan or proposed plan contains a rule that duplicates a provision in a national environmental standard.
- (2) Subsections (3) to (5) apply if a local authority's plan or proposed plan contains a rule that conflicts with a provision in a national environmental standard. A rule conflicts with a provision if—
  - (a) both of the following apply:
    - (i) the rule is more stringent than the provision in that it prohibits or restricts an activity that the



- (8) Every local authority and consent authority must enforce the observance of national environmental standards to the extent to which their powers enable them to do so.